

Attorney Docket No.: F7764US
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BRIEF FOR APPELLANT

Sir:

This is a Brief on Appellants' Appeal from the Examiner's Final Rejection concerning the above-identified application.

The Commissioner is hereby authorized to charge any additional fees, which may be required to our Deposit Account No. 12-1155, including all required fees under: 37 C.F.R. §1.16; 37 C.F.R. §1.17; 37 C.F.R. §1.18; 37 C.F.R. §1.136.

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I. REAL PARTY IN INTEREST

The Real Party in Interest in this Appeal is Conopco, Inc., d/b/a UNILEVER, a corporation of the State of New York. Conopco, Inc. is a subsidiary of Unilever United States Inc. which is owned indirectly by Unilever NV and Unilever P.L.C.

II. RELATED APPEALS AND INTERFERENCES

Neither the Appellants, their legal representatives nor the Assignee are aware of any other Appeals or Interferences relating to the present Appeal.

III. STATUS OF CLAIMS

This Appeal is taken from the Final Rejection of claims 2-7 and 10-14 through the pending claims in the application. Claims 1, 8 and 9 are canceled. A copy of the appealed claims is attached to this Brief as an Appendix.

IV. STATUS OF AMENDMENTS

No amendments to the claims were filed after final rejection.

V. SUMMARY OF THE CLAIMED SUBJECT MATTER

Claim 10 recites a bakery product (Specification, page 2, line 11) comprising flour (page 3, line 7) and from 0.5 to 15 wt% on flour (page 3, lines 6-8; page 10, lines 21-25) of sterol and/or stanol fatty acid ester and from 0.1 to 1 wt% of emulsifier on flour (page 10, lines 25-26), wherein the emulsifier is selected from the group of calcium stearoyl lactylate, sodium stearoyl lactylate, glycerol monostearate, sodium stearoyl fumarate, succinylated monoglyceride, ethoxylated mono- and diglycerides, diacetyl tartaric acid esters of mono- and diglycerides, polyglycerol esters, propylene glycol monoesters, polyglycerolesters, sorbitan esters or polysorbates, lecithin and a combination thereof (Page 10, lines 24-34).

VI. GROUNDS OF THE REJECTION TO BE REVIEWED ON APPEAL

The issue raised in this appeal is primarily one of fact and of the type normally encountered in connection with a rejection made under 35 USC § 103. In particular, the issue is as follows: whether claims 2-7 are rendered obvious by Yuan et al. as evidenced by Karppanen et al (EP 948 265B1).

VII. ARGUMENT

The present invention is directed to the discovery that bakery products containing a sterol and/or stanol ester, in combination with a selected emulsifier, show reduced staling on storage. The Office points to no teaching of the recited ingredients and levels nor to any composition which anticipates the claim. Moreover, the Office points to no teaching from which this discovery would be expected.

As recited in claim 10, the invention comprises a bakery product having flour and from 0.5-15 wt% on flour of sterol and/or stanol fatty acid ester. The bakery product further includes from 0.1-1% by weight of emulsifier on flour. The emulsifier is one or more of a group of emulsifiers recited in claim 10.

The Office rejects the claims as obvious over Yuan et al US Patent No. 6,190,720. Yuan et al. disclose a sterol composition which includes emulsifier and mentions approximately 25 different types of products in which it may be used. However, Yuan et al. do not provide any formulas for most of their suggested products, whereas the present claims recite specific levels of the sterol/stanol and emulsifier on flour. Therefore, it is difficult to see how the present invention could be considered *prima facie* obvious in view of Yuan et al. since Yuan et al. do not appear to discuss flour in their products or levels thereof.

The Office uses Karppanen et al. "as evidence" in the Yuan et al. obviousness rejection. Since the Office cannot find any levels of flour in Yuan et al., it relies on Karppanen et al. Example 1 of Karppanen et al. is entitled "white bread" and includes wheat flour, plant sterols and some emulsifiers. The Office presents calculations attempting to show that use of the Yuan et al. ingredient in Karppanen et al.'s bread

would bring one of ordinary skill within the levels recited within the present claims. However, the calculations appear to be flawed.

The Office points to the presence of 30 kilograms of flour in Karppanen et al. (apparently Example 1). However, in [0026], Karppanen et al. include 7.5 kilograms wheat flour in a premix and in paragraph [0027] the ingredients listed, including the 30 kg flour, are added to the premix. Therefore, as a preliminary issue, it appears that the 30 kilograms of wheat flour referenced by the Office is added to the premix, so that the 30 kilogram figure is not correct.

The Office indicates that if 20% of the food ingredient is used in a bread formulation containing 30kg of flour, then the amount of the food ingredient is 6kg. The logic of this is not understood. If 20% of the food ingredient is used in a bread formulation then the amount of the food ingredient is 20% of the mass of the bread, not 20% of the mass of the flour.

The Office makes two calculations. In the calculation just mentioned (page 3, top paragraph final rejection of 9/27/11), the Office assumes that Yuan et al.'s percentage by weight for the ingredient in the product (see column 6, second full paragraph) is by weight only of flour. Although applicants use weight percent on flour, applicants specifically indicate on flour. In contrast, the Office points to no indication that Yuan et al. intend weight percent on flour, so it is submitted that wt% in the entire product is called for. Especially is this true since the 5-20% range (Col. 6, line 27) covers a wide range of products, not just baked goods.

The Office's second calculation (see top of page 4 in the Final Rejection of September 27, 2011), is based on the weight percent of the Yuan et al. ingredient applied to the overall Karppanen et al. product, not just flour. However, the Office then considers the

weight percent of sterol ester and emulsifier on the overall product instead of on flour as recited in present claim 10. Even though wt % on the full product should be considered when trying to apply Yuan et al.'s teachings as to the level of their ingredient in another reference in accordance with Yuan's teachings, when trying to compare the combined references to the present claimed levels of sterol ester and emulsifier, the claimed weight percent on flour needs to be used. Thus, either way, erroneous results are obtained by the Office.

The Office points to the teaching of 1 wt% emulsifier by Yuan et al. The total white bread of example 1 of Karppanen appears to include 68.7 kilograms of ingredients. 1% of 68.7 is 0.687 kilograms of emulsifier presumably added in the Yuan et al. ingredient. Even ignoring the extra emulsifier present in the "Format" ingredient of the Karppanen et al. white bread, dividing 0.687 by 37.5 kilograms of wheat flour (total of both the top and the bottom boxes of example 1) results in 1.8%. 1.8 exceeds the 1% recited in claim 10.

Even if it is possible to select levels within the ranges of Yuan et al. which could be chosen to result in products within applicants claimed ranges, it is submitted that this hindsight reconstruction is not permitted by the patent laws.

In addition, the Office indicates that the unexpected result disclosed in the present specification is inherent in Yuan et al. As pointed out above, Yuan et al. do not disclose compositions for most of their laundry list of potential products. Therefore, it is difficult to see how Yuan et al. teaches any product within the claims, especially that Yuan et al. could inherently (inevitably according to In Re Oelrich, 666 F.2d 578 (CCPA 1981)) produce the same results. Moreover, the rejection is based on obviousness and the Office points to no authority indicating that inherency is a relevant factor in obviousness.

Since the Office has not found applicants' composition disclosed in Yuan et al., since the Office does not present a *prima facie* case of obviousness and since the Office has not demonstrated that the results obtained are expected, it is respectfully requested that the rejection be withdrawn.

VIII. CONCLUSION

Appellants respectfully request that the Board of Patent Appeals and Interferences reverse the Examiner's final rejection of claims 2-7 and 10-14 under 35 U.S.C. 103.

Respectfully submitted,



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IX. CLAIMS APPENDIX

Claim 1 (Canceled)

Claim 2 (Previously presented) The bakery product according to claim 10, wherein the emulsifier is selected from the group of calcium stearyl lactylate, sodium stearyl lactylate, glycerol monostearate and diacetyl tartaric acid esters of mono- and diglycerides and a combination thereof.

Claim 3 (Previously presented) The bakery product according to claim 10, wherein the emulsifier is selected from the group of calcium stearyl lactylate, sodium stearyl lactylate, glycerol monostearate and a combination thereof.

Claim 4 (Previously presented) The bakery product according to claim 10 wherein the emulsifier is CSL or SSL.

Claim 5 (Previously presented) The bakery product according to 10 wherein the fatty acid is derived from sunflower oil, rapeseed oil, safflower oil, coconut oil or a mixture thereof.

Claim 6 (Previously presented) The bakery product according to claim 10 which comprises a sterolester.

Claim 7 (Previously presented) The bakery product according to claim 10 wherein the weight ratio of the emulsifier to sterol is between 1 to 6 and 1 to 30.

Claim 8 (Canceled)

Claim 9 (Canceled)

Claim 10 (Previously presented) Bakery product comprising flour and from 0.5 to 15 wt% on flour of sterol and/or stanol fatty acid ester and from 0.1 to 1 wt% of emulsifier on flour, wherein the emulsifier is selected from the group of calcium stearyl lactylate, sodium stearyl lactylate, glycerol monostearate, sodium stearyl fumarate, succinilated monoglyceride, ethoxylated mono- and diglycerides, diacetyl tartaric acid esters of mono- and diglycerides, polyglycerol esters, propylene glycol monoesters, polyglycerolesters, sorbitan esters or polysorbates, lecithin and a combination thereof.

Claim 11 (New) The bakery product according to claim 10 made by including an anti-staling composition which comprises at least 80% emulsifier and sterol/stanol ester.

Claim 12 (New) The bakery product according to claim 10 having a softness of 200-300g.

Claim 13 (New) The bakery product according to claim 10 having a staling rate of less 100g per day.

Claim 14 (New) The bakery product according to claim 4 wherein the emulsifier comprises CSL.

X. EVIDENCE APPENDIX

No evidence pursuant to §§ 1.130, 1.131 or 1.132 are submitted herewith.

XI. RELATED PROCEEDINGS APPENDIX

No decisions rendered by a Court or the Board have been made; therefore, no such decisions are submitted herewith.